No. 06-369

CAPITAL CASE

In the
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,

Petitioner,

v.

VINCENT McFADDEN,

Respondent.

On Petition for Writ of Certiorari
to the Missouri Supreme Court

BRIEF IN OPPOSITION FOR RESPONDENT

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STATEMENT OF THE CASE

Vincent McFadden is a young black man (V.D.Tr. 679).[1] At his trial for capital murder, the State exercised five of its nine peremptory challenges to remove black jurors, allowing only one black juror to serve on the jury (V.D.Tr. 665-66). Defense counsel timely challenged the strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986) (V.D.Tr. 666).

The State provided the following reasons for striking these jurors. It alleged that it struck juror Carrie Warford because her cell phone rang during voir dire and she seemed to be fiddling with it, and she would have difficulty being absent from work one week (V.D.Tr. 668). The State said it struck juror Christine Nevills because she was an employee of the St. Louis City School District, would have trouble being absent from work for a week, was familiar with the neighborhood in which the crime took place, and had lived in a high-crime area but never heard gunshots (V.D.Tr. 666-67). The State said it struck Mary Byas for her acquaintance with a relative of a potential witness, problems with the concept of acting in concert, knowledge of the crime neighborhood, and confidence in fingerprint and DNA evidence (V.D.Tr. 672-73). It said it struck Virginia Glover because she was elderly and opinionated, lived in a high-crime area but denied that it was high crime, was physically infirm, had read about the case, and had family in the neighborhood of the crime who had been victims of crime (V.D.Tr. 669-70). Finally, the State alleged it struck William Sams because he seemed agitated, was sleeping at times, was confused about his role as a juror, lived near the crime scene neighborhood,

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[1] Citations to the transcript of the voir dire examination are referenced as "V.D.Tr.". Citations to the Appendix of the Petition for Certiorari are referenced as "Pet. App.".

and, for safety reasons, did not want to disclose details about his three nephews in law enforcement (V.D.Tr. 671).

Defense counsel argued that these reasons were pretextual (V.D.Tr. 673-75, 677-78). They stressed that Ms. Warford shut her phone off promptly (V.D.Tr. 673). They alerted the court that a white juror also had problems being absent from work for a week, but had not been struck by the State (V.D.Tr. 673-74). Counsel corrected the State's misstatements about Ms. Byas and Mr. Sams (V.D.Tr. 674-75). They advised the court that a white juror had also asked questions like Mr. Sams, yet had not been struck (V.D.Tr. 674-75). The defense again asserted that the strikes, which removed all but one of the black jurors, were unconstitutional (V.D.Tr. 679). The trial court denied the *Batson* claim, stating that (1) in the past, these prosecutors had never acted in a racially discriminatory manner regarding jury selection; and (2) the prosecutors had given numerous reasons for each strike and thus, there were no similarly situated white jurors whom the State had failed to strike (V.D.Tr. 676-77).

The Missouri Supreme Court reversed. *State v. McFadden*, 191 S.W.3d 648, 658 (Mo. banc 2006)(Pet. App. at 19). It engaged in a fact-specific inquiry of each of the State's reasons for striking the five excluded black jurors. *Id.* at 651-57 (Pet. App. at 5-17). It held that the prosecutors 1) failed to strike similarly situated white jurors; 2) failed to strike white jurors who logically seemed less favorable for the State than black jurors who were removed; 3) failed to ask questions on the purported areas of concern; 4) adopted justifications that were not logically relevant to the case; and 5) adopted justifications that were not supported by the record. *Id.* (Pet. App. at 5-17). The Missouri Supreme Court concluded that although some of the State's reasons in isolation

appeared valid, "in light of the totality of the facts and circumstances, it becomes obvious that these explanations were merely pretext for the State's exercise of its peremptory strikes for racially discriminatory reasons." *Id.* at 657 (Pet. App. at 17).

SUMMARY OF THE ARGUMENT

The Missouri Supreme Court properly followed the procedure that originated with *Batson v. Kentucky*, 476 U.S. 79 (1986), and continues to this day. In deciding whether the defendant met his burden of proving the prosecutors' discriminatory intent in removing five of the six potential black jurors, the appellate court looked at the totality of the circumstances. After considering numerous factors clear from the record of voir dire and the *Batson* hearing, it determined that the prosecutors' explanations were merely pretexts for racial discrimination.

Because this Court has entrusted each state judiciary to adopt its own particular procedures in implementing *Batson*, the Missouri Supreme Court should be allowed to determine when and how the defendant is to meet his burden of production and persuasion. Thus, the Missouri Supreme Court's holding in this case is limited to Missouri. The holding is highly dependent on the particular facts, and the Missouri Supreme Court applied the proper standard of review to those facts. The State's displeasure with the result of the Missouri Supreme Court's thorough application of long-standing precedent does not merit this Court's review. This opinion has no more import than any other state court opinion on a *Batson* claim.

REASONS FOR DENYING THE WRIT

I. The Missouri Supreme Court followed long-standing precedent in evaluating the totality of the circumstances.

The State condemns the Missouri Supreme Court for holding that the trial court clearly erred in denying Mr. McFadden's challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986). The Missouri Supreme Court, however, analyzed this claim in full accord with well-established precedent, both from this Court and Missouri courts. Its holding has no more import than any other state court opinion on a *Batson* claim.

In evaluating claims of racial discrimination in jury selection, lower courts follow a three-step procedure. *Batson*, 476 U.S. at 93-98. First, the defendant must demonstrate a prima facie case of purposeful discrimination. *Id.* at 93-96. Second, the State must come forward with clear, specific, and legitimate race-neutral explanations for its strikes. *Id.* at 97, 98 n.20. Third, the trial court must determine if the defendant has established purposeful discrimination. *Id.* at 98.

At this third step, the trial court must consider whether "the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id.* at 93-94, citing *Washington v. Davis*, 426 U.S. 229, 239-42 (1976). To this end, the trial court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 93, quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). The trial court must "assess the plausibility [of the State's justifications for its strikes] in light of all evidence with a bearing on it." *Miller-El v. Dretke*, 125 S.Ct. 2317, 2331 (2005). The trial court "should consider all relevant circumstances," including but not limited to patterns of strikes

against black jurors, the prosecutor's manner of questioning the venire panel, his statements and his demeanor, and proof of disproportionate impact. *Batson*, 476 U.S. at 93, 96-97.

In *Miller-El*, 125 S.Ct. 2317, this Court explained the various factors an appellate court should consider at this third step in determining whether the explanations for strikes are a pretext for racial discrimination. First, it considered the State's removal of a disproportionate number of black jurors. *Id.* at 2325. It conducted side-by-side comparisons of black jurors the State removed and white jurors it did not remove, as an indication of racial animus. *Id.* at 2325-29. The Court considered the State's failure to engage in meaningful voir dire on issues it claimed to be concerned about. *Id.* at 2328. It considered how reasonable the State's explanation was and whether the explanation had some basis in trial strategy. *Id.* at 2329. The Court also analyzed whether the prosecutor questioned black jurors differently than white jurors. *Id.* at 2333-38. It considered whether the State engaged in specific procedures designed to avoid seating black jurors and whether the prosecutor's office had past or current policies of excluding black jurors. *Id.* at 2338-39.

As this Court has instructed, Missouri courts have long considered the totality of the circumstances in reviewing claims of racial discrimination in jury selection. In determining whether a prosecutor has engaged in purposeful discrimination, the trial court "should take into account a variety of factors. *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc 1992). The first factor, and the "chief consideration" is the "plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case." *Id.*; see also *State v. Edwards*, 116 S.W.3d 511, 527 (Mo. banc

2003). Second, the court should consider the existence of similarly situated white jurors not struck by the State; third, the "degree of logical relevance" between the explanation and the case to be tried in terms of the nature of the evidence and the potential punishment; fourth, the prosecutor's statements and demeanor during voir dire, and the demeanor of the excluded jurors; fifth, the court's past experiences with the prosecutor; and sixth, "objective factors bearing on the state's motive to discriminate on the basis of race, such as the conditions prevailing in the community and the race of the defendant, the victim and the material witnesses." *Edwards*, 116 S.W.3d at 527; *Parker*, 826 S.W.2d at 939-40.

Here, the Missouri Supreme Court conducted the analysis mandated by this Court and by its own precedent regarding *Batson* claims. The analysis started with juror Carrie Warford. The court looked at the totality of the circumstances and concluded that Ms. Warford, logically, would have been a strong juror for the State, since her father, like the victim here, had been shot to death, and she had a working relationship with law enforcement. *McFadden*, 191 S.W.3d at 651 (Pet. App. at 5-6).[2] See *Miller-El*, 125 S.Ct. at 2329 ("Fields should have been an ideal juror in the eyes of a prosecutor seeking a death sentence"). In that context, it examined the reasons given by the State for her exclusion: that her cell phone rang and she fiddled with it, and that she would have

[2] The State argues that Ms. Warford would not have been a good juror for the State because she "was not satisfied with the manner in which her father's case had been concluded" (Cert. Pet. 18). When asked if she thought the police did a good or a bad job in that case, Ms. Warford commented that it would have been a good job if they had solved that crime (V.D.Tr. 514). Ms. Warford also stated that there was nothing about her father's case that would make her think that police officers were less credible than other witnesses (V.D.Tr. 643). She could consider all the evidence and argument, and her personal experiences would not cause her any difficulty (V.D.Tr. 642-43).

difficulty being absent from work a week. *McFadden*, 191 S.W.3d at 652 (Pet. App. at 6-7).

The Missouri Supreme Court noted that the State never made a record of the phone ringing and never asked the trial court to order the jurors to turn off their phones. *Id.* (Pet. App. at 6). Yet the State claimed it was so bothered by the cell phone that it removed Ms. Warford and allowed a white juror, John Black, to remain even though the State unsuccessfully moved to strike him for cause based on his repeated statements that he would hold the State to an impermissibly high burden of proof. *Id.* (Pet. App. at 6); see *Miller-El*, 125 S.Ct. at 2328 (evaluating the logic of the State's second explanation for striking a juror). The court acknowledged that there was no white juror whose cell phone rang. *Id.* (Pet. App. at 6). The *Batson* challenge was not automatically defeated by the lack of an exactly identical white juror, however, because "potential jurors are not products of a set of cookie cutters." *Id.* (Pet. App. at 6), citing *Miller-El*, 125 S.Ct. at 2329, fn.6.

With regard to the State's second basis for removing Ms. Warford, the Missouri Supreme Court concluded that white juror Sharon Ruebel expressed a more definite case of hardship than Ms. Warford, yet she was not removed by the State. *Id.* (Pet. App. at 7); see *Miller-El*, 125 S.Ct. at 2325-31. Ms. Warford was one of three managers for a cleaning company. *Id.* (Pet. App. at 7). One of the other managers was out sick, so she did not know if her boss would allow her to be gone. *Id.* (Pet. App. at 7). She handled all buildings in the evening, making sure that all the cleaners showed up on time and dealing with any problems that arose. *Id.* (Pet. App. at 7).

In contrast, Ms. Ruebel worked for a company that was about to undergo an audit. *Id.* (Pet. App. at 7). She was "one of the key people," and her employer had written a letter for her to give to the court explaining the extent of the hardship her absence would cause. *Id.* (Pet. App. at 7). She worked in the "back office" and needed "to account for all the transition. The cash coming in and out." *Id.* (Pet. App. at 7). A lot of work was needed to prepare for the audit. *Id.* (Pet. App. at 7).[3]

The Missouri Supreme Court noted that in addition to having a more definite statement of hardship, Ms. Ruebel had another ground for removal: her familiarity with the neighborhood in which the crime took place. *Id.* (Pet. App. at 7). The State used familiarity with the neighborhood as a basis for removing four black jurors, but it did not remove any of the five white jurors who also were familiar with the neighborhood. *Id.* at 653, fn. 15. (Pet. App. at 7-8).

The Missouri Supreme Court then evaluated the totality of circumstances regarding the State's exclusion of the four other black jurors: Christine Nevills, Mary Byas, Virginia Glover, and William Sams. *Id.* at 653-57 (Pet. App. at 8-17). The court concluded that that the prosecutors 1) failed to strike similarly situated white jurors; 2) failed to strike white jurors who logically seemed less favorable for the State than black jurors who were removed; 3) failed to ask questions on the purported areas of concern; 4) adopted justifications that were not logically relevant to the case; and 5) adopted justifications that were not supported by the record. *Id.* (Pet. App. at 8-17). The Missouri Supreme Court concluded that although some of the State's reasons in isolation

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[3] The State's characterization of Ms. Ruebel as merely a "cashier" is somewhat misleading, in that it leaves the impression that she was a "check-out girl" (Cert. Pet. 18). Ms. Ruebel's job title was a "cashier," but she was an operations person for Wachovia Security and had a significant amount of responsibility in the company (V.D.Tr. 163).

appeared valid, "in light of the totality of the facts and circumstances, it becomes obvious that these explanations were merely pretext for the State's exercise of its peremptory strikes for racially discriminatory reasons." *Id.* at 657 (Pet. App. at 17).

Because this case is so detailed factually, Mr. McFadden will not relate every aspect of the Missouri Supreme Court's analysis regarding the four other black jurors, but will set forth several examples demonstrating the pretextual nature of the State's explanations. The court noted that some of the reasons the State gave for striking black jurors typically would be strong reasons for the State to want to keep jurors:

- Normally, the State would want a juror such as Mary Byas, who expressed confidence in the ability of fingerprint evidence to show guilt, especially since the defendant presented an alibi defense, yet fingerprint evidence tied him to the scene. *Id.* at 654 (Pet. App. at 11). She also had a family member who had been shot to death, like the victim here. *Id.* (Pet. App. at 10).
- The State normally would want jurors like William Sams, who had three nephews in law enforcement and a positive attitude toward law enforcement. *Id.* at 657 (Pet. App. at 17).
- The State typically would want a juror like Virginia Glover, who revealed that her sister lived in the neighborhood of the crime and had been the victim of arson. *Id.* at 656 (Pet. App. at 14). After all, the State alleged that the defendant terrorized that neighborhood and that if the jurors cared about the people there, they would find the defendant guilty. *Id.* (Pet. App. at 14). Ms. Glover's connection to the neighborhood would only have helped the State. *Id.* (Pet. App. at 14).

In light of the State's trial strategy, these should have been reasons for keeping these jurors, not removing them. *Miller-El*, 125 S.Ct. at 2329.

The Missouri Supreme Court stressed that the State failed to strike similarly situated white jurors. *Id.* at 652-56 (Pet. App. at 5-16). The court noted that the State struck four black people because they were familiar with the neighborhood where the crime occurred, yet failed to strike any one of the five white jurors familiar with the neighborhood. *Id.* at 652-54, 656 (Pet. App. at 7, 8 at fn.15, 10-11, 14, 15-16). Indeed, the State struck Mr. Sams because of the mere possibility that he was familiar with the neighborhood, yet failed to use this basis to remove any of the five white jurors who definitely knew the neighborhood. *Id.* at 652-53, fn. 15, 656 (Pet. App. at 8, 15-16). The State also failed to remove similarly situated white jurors with regard to physical disability, exposure to police laboratory work, and exposure to pretrial publicity. *Id.* at 654-56 (Pet. App. at 11-14).

The Missouri Supreme Court noted that the State used justifications for removing black jurors that were illogical, not the topic of questioning, or unsupported by the record. For example, the State removed Christine Nevills, in part, because she had lived in a high crime area yet never heard gunshots. *Id.* at 653-54 (Pet. App. at 9). The court acknowledged that the issue was loosely related to the case, because witnesses testified that they heard gunshots. *Id.* (Pet. App. at 9). But the witnesses' recognition of the sound of gunshots was not in dispute, and whether a juror had ever heard gunshots in her neighborhood was immaterial. *Id.* (Pet. App. at 9). Furthermore, the State failed to question the entire venire on the issue, which demonstrated that it was not truly an area of concern. *Id.* (Pet. App. at 9-10). The State also gave the explanation that one of these

jurors had problems with the concept of acting in concert, but the juror actually never had expressed such a difficulty. *Id.* at 654 (Pet. App. at 11).

II. Sufficient record was made at the *Batson* hearing.

The State's major complaint is that some of the observations made by the Missouri Supreme Court after examination of the record were not first stated by defense counsel during the *Batson* hearing (Cert. Pet. 6-11). Defense counsel did not "stand silent," nor was the defendant's "burden of production and persuasion wholly eliminated" by the opinion (Cert. Pet. 8, 10). Counsel argued that the State's reasons were pretextual and pointed out similarly situated white jurors who had not been struck (V.D.Tr. 673-75, 677-78). Counsel contested the State's observations and corrected the prosecutor's misstatements about the black jurors (V.D.Tr. 673-75). Counsel asserted that the strikes, removing all but one of the black jurors, were unconstitutional (V.D.Tr. 679).

The defense also met its burden by ensuring that the evidence it would rely on to prove discrimination was made part of the record during voir dire or at the *Batson* hearing. *Miller-El*, 125 S.Ct. at 2326, fn.2 ("There can be no question that the transcript of *voir dire*, recording the evidence on which Miller-El bases his arguments and on which we base our result, was before the state courts"). The reviewing court, like the trial court, must evaluate the totality of circumstances and undertake a sensitive examination of "such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 93-94. Like the trial court, the reviewing court must consider "all relevant circumstances," id. at 93, 96-97, and "assess the plausibility [of the State's

justifications for its strikes] in light of all evidence with a bearing on it." *Miller-El*, 125 S.Ct. at 2331. Thus, it is only logical that the appellate court, like the trial court, evaluate everything within the four corners of the voir dire examination, not just the circumstances mentioned by defense counsel.

Missouri courts have rejected the State's argument that an appellate court cannot consider any facts or arguments that the defense did not specifically argue at the *Batson* hearing. In *State v. Davis*, 894 S.W.2d 703, 707 (Mo. App. W.D. 1995), the State argued that the reviewing court should disregard circumstances that defense counsel failed to bring to the attention of the trial court. The Missouri Court of Appeals held that, "[t]he State's position is not an accurate statement of the law in this state." *Id.* It explained that when the defense presents no evidence or argument at the third step, it is assumed that no *Batson* challenge is made and the issue is not preserved for appeal. *Id.* But when the defendant offers arguments that the State's reasons were pretextual, both the trial court and the reviewing court must evaluate not just the arguments raised by counsel, but the totality of the circumstances. *Id.* at 707-708.[4]

In *State v. Hopkins*, 140 S.W.3d 143, 150 (Mo. App. E.D. 2004), the defendant argued at the *Batson* hearing that similarly situated white jurors were not removed by the State. The Court of Appeals considered that factor, but also considered other factors not mentioned at the *Batson* hearing: the degree of logical relevance between the State's reason and the case to be tried, the court's past experiences with the prosecutor, the prosecutor's statements and demeanor, the prosecutor's failure to question about a

[4] The State did not challenge the opinion of the Court of Appeals by filing a motion for rehearing and/or transfer to the Missouri Supreme Court.

purported area of concern, and whether anything else in the record showed that the excluded juror would have been a bad juror for the State. *Id.* at 150-51. The Court of Appeals conducted this analysis for each of the three jurors whose removal was challenged under *Batson*, and it concluded that the trial court clearly erred in overruling the challenges. *Id.* at 157[5]; see also supra p. 5-6, *Edwards*, 116 S.W.3d at 527 (setting forth factors that the trial court – and hence the appellate court – should consider).

The State argues that it is unfair not to limit consideration to just the matters mentioned by defense counsel at the hearing, because if defense counsel had said more, the prosecutors could have made further explanations (Cert. Pet. 8). But this Court has rejected that argument already, in *Miller-El*. There, after the stated reason for removing juror Fields was shown to be unsupported by the record, the prosecutor advanced a substitute reason. This Court instructed that, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Id.*, 125 S.Ct. at 2332. The prosecutors here were told to give their reasons for striking the five black jurors (V.D.Tr. 666). They had immediate, present knowledge of their reasons for the strikes, because they had made their decisions on the peremptory strikes moments earlier. To add substitute reasons once their initial reasons are shown as pretextual, "reeks of afterthought" and should be considered "makeweight." *Id.* at 2328.

In contrast, defense counsel has a much harder task – an accurate evaluation of the prosecutor's reasons for a strike may well require an examination of the entire voir dire. Uncovering evidence of pretext is not always easy. Some items can be revealed obviously and quickly; other evidence of pretext is more subtle. In some instances, the

[5] The Missouri Supreme Court denied the State's motion for transfer. The Honorable John A. Ross was the trial judge in *Hopkins* and in the instant case.

prosecutors' credibility may be determined better from the record than from his in-court statements and demeanor. See, e.g., *Miller-El*, 125 S.Ct. at 2332-33. For example, patterns of questioning may become more apparent from the record than during the course of a long and stressful voir dire. *Id.* at 2333-35.

III. The Missouri Supreme Court's review was sufficiently deferential to the trial court.

The State argues that the Missouri Supreme Court was not deferential enough to the trial court, because the trial court alone can gauge credibility and demeanor (Cert. Pet. 14-19). It argues that the Missouri Supreme Court improperly engaged in *de novo* review (Cert. Pet. 14-19). To follow the State's logic, there could never be appellate review of a trial court's finding on a *Batson* motion. Appellate courts would always have to defer to the circuit court's findings, precluding any meaningful appellate review.

But as this Court has acknowledged, "[d]eference does not by definition preclude relief." *Miller -El*, 125 S.Ct. at 2325, quoting *Miller -El v. Cockrell*, 537 U.S. 322, 340 (2003). Under the clear error standard, a reviewing court must reverse when, "on the entire evidence," it is "left with the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). Despite the State's displeasure with the outcome, a thorough review of the record does not necessarily amount to *de novo* review. The Missouri Supreme Court properly applied the clear error standard.

IV. Any conflict is immaterial.

The State also argues that this decision conflicts with holdings of other courts (Cert. Pet. 11-14). The State struggles to make this case something other than what it truly is, to try to demonstrate a conflict. But really this opinion is just a state court applying its own procedures and precedents, as well as this Court's precedents, in a very fact-specific analysis. The cases that the State cites are not truly in conflict.

The State presents *State v. Walston*, 886 P.2d 349 (Kan. 1994), for the proposition that if a defendant does not state at the *Batson* hearing that several jurors are similarly situated, he may not allege it on appeal. In *Walston*, the Kansas Supreme Court recognized that the defendant had not raised that point at the *Batson* hearing, and that the defendant has the burden of persuasion. *Id.* at 383. The court, however, then did in fact analyze whether the jurors were similarly situated. *Id.* Thus, *Walton* does not stand for the proposition that failure to mention at the *Batson* hearing a specific circumstance that is otherwise obvious from the record waives appellate consideration of that circumstance.

The State also cites *United States v. Forbes*, 816 F.2d 1006 (5th Cir. 1987) as being in conflict with the instant case. In *Forbes*, however, the issue was not whether the defendant waived for appeal consideration of any circumstances not mentioned at the *Batson* hearing. *Id.* at 1011. Rather, *Forbes* involved the defendant's failure to request an explanation of one of the strikes. *Id.* The defendant foreclosed any review of that strike by not requesting that the prosecution give an explanation that could be considered by the trial court and later, a reviewing court. *Id.* That is not the issue here.

At any rate, whether certain federal courts or the State of Kansas have procedural requirements potentially different from Missouri's is immaterial, since this Court has granted each state court system the freedom to impose its own procedural requirements within *Batson's* framework. Recognizing the variety of jury selection practices followed in state and federal courts, this Court declined to formulate specific procedures to be implemented. *Batson*, 476 U.S. at 99. and 99, fn.24. Whether a defendant in a Missouri state court has properly raised and preserved his allegations are issues particularly within the bailiwick of the Missouri Supreme Court.

Because this Court has entrusted each state judiciary to set forth its own particular procedures in implementing *Batson*, the Missouri Supreme Court's holding in this case is limited to Missouri. The holding is highly dependent on the facts, and the Missouri Supreme Court applied the proper standard of review to those facts. The case is as fact-bound as they come, depending on several propositions apiece about five jurors whom the prosecution struck and several facts apiece about some jurors whom it did not strike. This decision is therefore necessarily unlikely to have wide effect. The Missouri Supreme Court should be allowed to determine when and how the defendant is to meet his burden of production and persuasion. Mr. McFadden respectfully requests that the petition for a writ of certiorari be denied.

CONCLUSION

For the foregoing reasons, Mr. McFadden respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rosemary E. Percival, hereby certify that on this 16th day of October, 2006, a true and correct copy of the foregoing was mailed postage prepaid to Shaun Mackelprang, the Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102.

Rosemary E. Percival